PP

v.

IBRAHIM MAHMUD

HIGH COURT MALAYA, ALOR SETAR
VINCENT NG J
[PJK NO: 45(46)-01-00]
22 APRIL 2001

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B - Trafficking in dangerous drugs - Meaning of 'anything whatsoever containing any dangerous drugs' - Whether a car amounts to such meaning - Section 37(d)*

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B - Trafficking in dangerous drugs - Whether accused found in exclusive possession of such drugs - Section 37(d)*

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B - Trafficking in dangerous drugs - Tests conducted by chemist - Whether conclusive*

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B - Trafficking in dangerous drugs - Whether substance tested homogenous - Whether homogeneity of substance doubted - Whether such doubt resulted in prosecution having failed to prove case beyond reasonable doubt*

EVIDENCE: *Presumption - Adverse inference - Failure of prosecution to call certain witnesses - Whether witnesses material to case - Whether failure to call such witness resulted in prosecution failing to discharge burden to prove beyond a reasonable doubt - Evidence Act 1950, s. 114(g)*

EVIDENCE: *Witness - Discrepancy in evidence - Evidence given in relation to identity of drugs - Whether such discrepancy resulted in prosecution having failed to prove case beyond reasonable doubt*

The accused was charged for the offence of drug trafficking under s. 39B of the Dangerous Drugs Act 1952. The facts adduced by the prosecution were that one Inspector Mohd Fadzil (PW3), upon receiving certain information, called his men to attend a briefing in relation to the raid to be conducted. The accused driving a white Ford TX3 car (P20) was followed as he passed Bukit Kayu Hitam until he arrived home. The accused stayed at home until a metallic silver pick-up driven by a lady, one Noor Faridah (the wife of the nephew of the accused) came to the house. This was followed by the nephew of the accused driving a Proton Putra (P19). The metallic silver pick-up then left, heading towards Alor

Setar while the accused and his family subsequently drove P19 towards Alor Setar. When the accused returned, the members of the raiding party approached the house and PW3 saw the accused in the process of putting some solid items which he suspected to be heroin into the rear speaker compartment of the P19. PW3 then identified himself to the accused and arrested him. He said that the accused was in a state of shock and was shivering before he was arrested.

PW3 then carried out an examination of P19 and upon checking the said speaker space found 25 plastic packets containing substance in a compressed form suspected to be heroin. PW3 also examined P20 and found 25 plastic packets containing substance in a compressed form suspected to be heroin. Two other persons were later arrested, the two being the accused's nephews.

At the close of the prosecution's case having established that there was a *prima facie* case, the defence was called. In his evidence the accused testified that his nephew, Wahid together with a Chinese man came to the house to borrow P20 and that the car was borrowed for one day. According to the accused, the next day he had to travel to Bukit Kayu Hitam to collect his car from Wahid. The very same day, the accused's other nephew, Yusof and his wife, Noor Faridah visited him at his house. That evening the accused drove P19 to his brother's house. He was at his brother's house for about an hour before proceeding home. At about 7.50pm he came out of his house to move P19 as it was obstructing the way. While he was opening the car door, he was ambushed by a police party.

The issues which arose for consideration were in relation to: (a) the identity of the drug exhibits; (b) the nature of the recovery of such drugs; and (c) the exclusivity of such possession. The court also had to deal specifically with (a) whether s. 114(g) should have been invoked against the prosecution for failing to call the accused's nephews; (b) whether the accused was really caught red-handed; and (c) whether there were any discrepancies in the nature of the drug exhibits.

Held:

[1] After the accused is called to enter his defence, as the general burden of proof rests on the prosecution throughout the trial to prove its case, the court is not restricted to merely evaluating the evidence adduced by the defence. It is nevertheless the duty of the court to also carefully reevaluate the whole of the evidence of the prosecution in conjunction with the evidence of the defence to determine upon a higher standard of proof whether a reasonable doubt has been raised as to the guilt of the accused.

[2] Section 114(g) of the Evidence Act was designed and intended to be the prosecution's shield against the invocation of the adverse inference – but not as a prosecution's sword with which to thrust on to a conviction. Thus in respect of the essential ingredients of their case, the prosecution is in law required throughout the whole trial to wield and thrust the sword into the very corpus of the defence by establishing and fastening onto the accused the essential ingredients of the offence. It is untenable in law for the prosecution to offer witnesses so as to enable the defence to fill up any material gaps in the prosecution's case. It is trite that possession is an essential ingredient of the charge – and it is also trite, logical and incontrovertible that in any possessory offence, possession bereft of exclusivity bears no significance and attracts no consequence in criminal jurisprudence.

[2a] Since the prosecution was required to call all witnesses necessary to unfold the narrative of their case, the legal requirement of the narrative of the prosecution in the case at hand would necessarily have been to establish exclusivity of possession on the part of the accused.

[2b] By their failure to call the two nephews of the accused, the prosecution had unwittingly projected an equivocation in terms of at least three probable factual permutations, namely (a) that the accused was in exclusive possession of the offending drugs to the exclusion of all persons including the two nephews; or (b) that both or either one of the two nephews was in exclusive possession of the same to the exclusion of the accused and all persons; or (c) that the accused together with his two nephews were in exclusive possession to the exclusion of the rest of the world.

[2c] Even though the two nephews were offered to the defence, due to the crucial materiality of the gap in the evidence, the failure to call them would constitute withholding or suppression of evidence and since they had not discharged their duty, the accused was entitled to have the benefit of the more favourable second factual permutation.

[3] A car does not fall within 'anything whatsoever containing any dangerous drugs' as provided for in s. 37(d) of the Dangerous Drugs Act 1952. Therefore the evidence that the accused was caught inserting the packages containing the impugned drugs into the side compartment of P19 did not constitute proof that the accused was

in exclusive custody and control of the offending items and therefore the presumption under s. 37(d) of the DDA 1952 should not have been invoked.

[4] In a criminal case, especially where it concerns a matter of life and death, the accused is entitled to take every defect in the prosecution's case however technical it may be, a *fortiori* in cases involving heroin, which attracts the normal scientific phenomenon that its original white colour sustains significant change due to oxidation occurring during the passage of time from seizure to trial.

[4a] In examination in chief, on 30 July 2000, the prosecution's main witness, PW3 stated repeatedly that the items seized were 'ketulan' whereas on 31 July 2000 he changed his version and said that the items recovered were 'bahan mampat'. Such discrepancies therefore have resulted in the prosecution having failed to discharge its burden as required by law on the identity of the alleged drug contents.

[5] According to the facts, the chemist had conducted the Frohde and Marquis tests which she herself had admitted were not conclusive. In fact the chemist had stated that the conclusive test was the TLC (Thin Layer Chromatography) test which she had failed to conduct. In the circumstances, there was definite doubt as to whether an adequate quantity of substance was used in the only analysis that could provide conclusive results, resulting in doubt whether at least 15g of the impugned drugs was heroin as defined in the DDA.

[6] The need for the substance tested to be homogenous is vital in cases where the drugs concerned is alleged to be heroin. The chemist testified that to disintegrate the compressed material, she used 'ordinary kitchen blenders'. Having regard to the fact that (a) the blenders were accessible and regularly used by eight other chemists at the Penang Chemistry Department, the possibility of the blenders being blunt due to over use and therefore the substances not having been uniformly blended; (b) the fact that the chemist had conceded that she had no mechanical knowledge whatsoever in relation to the said blenders; (c) that the blenders did in fact sustain damage occasionally; (d) that the chemist did not know when the blenders were purchased and did not replace the rotating blades in the blenders with new ones before she commenced the grinding process, there certainly were doubts as to the proper functionality of the said blenders, which as a consequence would give rise to a doubt as to the homogeneity of the substance analysed.

[6a] The court must act on the evidence available and although the chemist testified that she was satisfied that the said substance was homogenous, her conclusion certainly could not be supported by the methodology of blending adopted by her.

[6b] Since there was doubt as to whether or not the substance was sufficiently homogenous – which by itself might or might not be fatal to the prosecution, depending on the weight of samples tested – the failure of the chemist to specify the actual weight of the samples tested aggravated the position. That was because it could not conclusively be said beyond reasonable doubt that due to the homogeneity of the substance there was no necessity to specify the weight of the samples. Essentially when a man's life is at stake, sufficiently rigorous standards of scientific analysis of drugs ought to be adopted.

[Accused acquitted.]

Case(s) referred to:

Abdullah Zawawi v. PP [1985] 2 CLJ 2 ***(foll)***
Chua Keem Long v. PP [1996] 1 SLR 510 ***(refd)***
Jazuli Mohsin v. PP [1990] 1 CLJ 915 ***(refd)***
Kadir Awang v. PP [1989] 2 MLJ 33 ***(refd)***
Kumaraguru & Ors v. PP [1994] 2 CLJ 53 ***(foll)***
Leong Bon Huat v. PP [1993] 3 CLJ 603 ***(refd)***
Lim Young Sien v. PP [1994] 2 SLR 257 ***(refd)***
Mohd Iqbal M Shaikh & Ors v. State of Maharashtra [1998] SCC (Cri) 1064 ***(refd)***
Mohd Radhi Yaakob v. PP [1991] 3 CLJ 2073 ***(refd)***
Namasiyiam & Ors v. PP [1987] 1 CLJ 540 ***(refd)***
Pavone v. PP [1984] 1 MLJ 77 ***(foll)***
Satli Masot v. PP [1999] 2 SLR 637 ***(foll)***
Seneviratne v. R [1936] 3 All ER 36 ***(refd)***
Pang Chee Meng v. PP [1999] 1 MLJ 137 ***(foll)***
PP v. A Rashid Ismail [2001] 1 AMR 1149 ***(refd)***
PP v. Ang Soon Huat [1991] 1 MLJ 1 ***(foll)***
PP v. Chew Yoo Choi [1990] 2 MLJ 444 ***(refd)***
PP v. Lim Lian Chen [1992] 2 CLJ 2086 ***(foll)***
PP v. Mansor Abd Rashid [1997] 1 CLJ 233 ***(foll)***
PP v. Ong Cheng Heong [1998] 4 CLJ 209 ***(refd)***
PP v. Noordin Awang [2001] 1 AMR 855 ***(refd)***
PP v. Peter Yeoh & Anor [1993] 1 CLJ 78 ***(dist)***
PP v. Saad Mat Takraw & Anor [1998] 3 CLJ 380 ***(refd)***
Teoh Hoe Chye v. PP [1987] 1 MLJ 220 ***(refd)***
Teoh Tian Lai v. PP [2001] 1 MLJ 257 ***(cit)***

Ti Chuee Hiang v. PP [1995] 3 CLJ 1 ***(foll)***
Tong Peng Hong v. PP [1995] MLJ 232 ***(refd)***
Yeong Kia Heng v. PP [1992] 1 CLJ 364 ***(foll)***

Legislation referred to:
Criminal Procedure Code, ss. 180(i), 182A(i)
Dangerous Drugs Act 1952, ss. 37(d), (da)(i), (h), (j), 39B(1)(a), (2)
Evidence Act 1950, s. 114(g)
Penal Code, s. 34
Weights and Measures Act 1972, reg. 27(1)

For the accused - Jagdeep Singh Deo; M/s Karpal Singh & Co
For the prosecution - Azmi Ariffin; DPP

Reported by Mariette Peters-Goh

JUDGMENT

Vincent Ng J:

Before this court, the above named accused was charged on two counts, to wit:

> Bahawa kamu pada 30hb. Januari 1999, jam lebih kurang 8.15 malam, di dalam kenderaan Ford TX3 no. PBG 6179, di hadapan rumah no. 24, Taman Nuri, Alor Setar, Kedah di dalam daerah Kota Setar, di dalam Negeri Kedah telah mengedar dadah berbahaya iaitu heroin yang beratnya 6,462.8 gram dan oleh yang demikian itu kamu telah melakukan satu kesalahan di bawah seksyen 39B(2) Akta yang sama.

(Translation: That you on 30 January 1999 at about 8.15pm, in a vehicle namely Ford TX 3 bearing registration plate number PBG 6179, opposite house No. 24 Taman Nuri, Alor Setar, Kedah, in the district of Kota Setar, in the State of Kedah did traffic in dangerous drugs, to wit, weighing 6,462.8 gram and thereby you have committed an offence under s. 39B(1)(a) Dangerous Drugs Act 1952 and punishable under s. 39B(2) of the same Act).

> Bahawa kamu pada 30hb. Januari 1999, jam lebih kurang 8.00 malam, di dalam kenderaan Proton Putra no. ADP 9630, di hadapan rumah No. 24, Taman Nuri, Alor Setar, Kedah di dalam daerah Kota Setar, di dalam Negeri Kedah telah mengedar dadah berbahaya iaitu heroin yang beratnya 6,429.2 gram dan oleh yang demikian itu kamu telah melakukan satu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

(Translation: That you on 30 January 1999, at about 8pm, in a vehicle namely Proton Putra bearing registration plate number ADP 9630, opposite house No. 24, Taman Nuri, Alor Setar, Kedah, in the District of Kota Setar, in the State of Kedah did traffic in dangerous drugs, to wit, weighing 6,429.2 gram and thereby you have committed an offence under s. 39B(1)(a) Dangerous Drugs Act 1952 and punishable under s. 39B(2) of the same Act).

The facts of the prosecution's case were elicited principally from Chief Insp. Mohd Fadzil bin Saad (PW3) during examination-in-chief which was largely supported by the evidence of PW7. He gave the following account of what happened.

On 23 January 1999 at about 9.30pm upon receiving certain information, Chief Insp. Mohd. Fadzil bin Saad, (PW3) called his men for a briefing. Besides PW3, eleven others from the IPK Narcotics Department attended the briefing. At the briefing, the twelve members of the IPK Narcotics Department were divided into four groups. A leader was appointed from each group. Group one was led by D/Kpl Nasir, group two by D/S/M Hamzah, group three by PW3 himself and the fourth group was led by Insp. Tan Chong Ling. Members were told of the purpose of the briefing and the tasks that are to be carried out by each group. Their first instruction was to be at their designated location on 30 January 1999 at 6am. On 30 January 1999 at about 9.10am, D/Kpl Nasir and D/Kpl Roslan Saat of group one reported by walkie talkie that a white Ford TX3 car bearing registration No. PBG 6179 (exh. P20) was going pass Bukit Kayu Hitam complex and heading south towards the direction of Jitra. And at about 9.50am the car reached the Jalan Sultanah Toll Plaza. From the Jalan Sultanah Toll Plaza onwards the task of trailing the car was taken over by group two. At 10am, D/S/M Hamzah (PW7) who led group two reported that the said car stopped at Marvel Tyre at Jalan Dato Kumbar. D/S/M Hamzah also reported that, there was no other person than the driver. Later, the driver was identified by L/Kpl Tamichelvan a/l Perumah (PW4) as the accused, when he gave evidence in court. According to PW4, on 30 January 1999 at about 9am he saw the accused driving P20 going pass the immigration check-point at the Bukit Kayu Hitam complex. PW4 then recorded what he saw in his note book (exh. 26). PW4 could identify the accused as he used to see the accused carrying out malaria preventive patrol at the Immigration Complex in Bukit Kayu Hitam.

According to D/S/M Hamzah (PW7), at 11am, he saw P20 arriving at a house at No. 24, Taman Nuri, Alor Setar. After taking his clothes from the car, the driver of P20 (who was identified as the accused) then entered the house. He stayed in the house until 4.10pm. At 4.10pm a metallic silver

pick-up bearing Thai registration No. VJ 361 driven by a lady came to the house. The silver pick-up vehicle was, few minutes later, followed by a Proton Putra bearing registration No. ADP 9630 (exh. P19). The driver of the Proton Putra was a man. At this juncture it may be noted that the court was not enlightened by any of the prosecution's witnesses as to the identity of the driver of the Proton Putra. That driver came out from the car and proceeded into the house compound. The accused who was then in the house, came out. The accused then chatted with the driver of the Proton Putra at the house compound. It was later disclosed in the evidence of the investigating officer ASP Mohd Zuhairi bin Hamzah (PW5) – and confirmed by the evidence of Abu Kasim bin Mohd (PW6), who was in charge of office records at the Road Transport Department of the State of Kedah – that the owner of the Proton Putra (P19) was one Noor Faridah bt Mohd Saidin who was also the said lady who drove the metallic silver pick-up. According to the Investigating Officer, Noor Faridah is the wife of Yusuf bin Mat (one of the two accused's nephews highly featured in the case).

Few minutes later the driver of Proton Putra left the house with the metallic silver pick-up. When D/S/M Hamzah arrived at the junction of Taman Nuri he noticed the pick-up heading towards Alor Setar. Through the walkie talkie PW3 instructed D/S/M Hamzah and D/Kpl Salim to tail the pick-up on his motorcycle. Not long thereafter D/Kpl Salim reported to PW3 that he had lost sight of the pick-up. D/S/M Hamzah then went back to the house at No. 24 Taman Nuri to continue with the observation over the house. He made the observation using a pair of binoculars. At about 5pm he saw (the accused) the driver of P20 (the white Ford TX3) come out of the house together with his wife and his two children. He (the accused) then drove the Proton Putra (P19) heading towards Alor Setar, together with his family. D/Sjn Nazri who was then instructed by PW3 to tail the car, reported that the car went towards Sungai Baru, Gunung Keriang.

According to PW7 (D/S/M Hamzah), the accused came back to the house at 8pm. As it was quite dark at that time, PW3 and other members of the raiding party approached the house. They saw the accused come out of the house and thereafter he went towards the Ford TX3 car and entered through its rear door. About seven minutes later he came out with a blue striped bag (exh. P5B). He then went to the Proton Putra (P19) and entered the car from the offside rear door.

PW3 and members of the raiding party then approached the Proton Putra. PW3 then saw the accused in the process of putting some solid item which he suspected to be heroin into the rear speaker compartment of the said car. This piece of evidence of PW3, was also supported by the evidence of PW7 during cross-examination. PW3 told the court that he could see all of this as the light in the car was on at that time. He then identified himself to the accused and arrested him. He said that the accused was in a state of shock and was shivering before he was arrested.

Upon arrest the accused was ordered to get out from the car. Immediately thereafter, PW3 carried out an examination on the said Proton Putra. While he examined the car, PW3 found a screw driver and a blue striped bag (exh. P5B) at the passenger seat. PW3 then conducted a search of the rear side speaker-space of the Proton Putra. Upon checking the said speaker-space he found 25 plastic packets (exh P12(A-Y)) (each of which was in turn wrapped within plastic bags P13A-Y) containing substance in a compressed form suspected to be heroin. All of the 25 packets he loaded into the blue striped bag. PW3 and one Insp. Noor Shahariman then took charge of guarding the car and the incriminating items.

Immediately after examining the Proton Putra bearing registration No. ADP 9630 (P19), PW3 examined the Ford TX3 bearing registration No. PBG 6179 (P20), and he found at the left back portion of the rear seat, 25 plastic packets (exh. P17 (A-Y)) (each of which was in turn wrapped within plastic bags P18A-Y) containing substance in a compressed form suspected to be heroin. After PW3 came out from the Ford TX3 car, he ordered Insp. Tan Chong Ling to carry out a search on the house at No. 24 Taman Nuri. About 20 minutes later Insp. Tan came out from the house and said he found nothing incriminating therein.

All 25 plastic packets recovered from P19 together with the other 25 plastic packets from P20 – both suspected to contain heroin – were then taken by PW3 to the Narcotics Department at the IPK Alor Setar in the Proton Putra (P19) driven by D/S/M Hamzah (PW7). PW3 arrived at IPK Alor Setar at 9.15pm. At 10pm. PW3 lodged a police report No. 1234/99 (exh. P21). Thereafter PW3 informed ASP Mohd Zuhairi bin Hamzah (PW5), the Investigating Officer of the report, and handed over the accused together with all the exhibits to the latter. The Investigating Officer in his evidence also told the court that besides the accused, there were two other persons who were later arrested in connection with the report (P21) lodged by PW3. The two were Yusuf bin Mat and Wahid bin Mat, both being the accused's nephews. This was also confirmed by PW7 (Hamzah bin Ayub) under cross-examination, when he told the court that both Yusuf and Wahid were

arrested a day after the accused was arrested. Both of them were arrested under the Special Preventive Measures Regulations (L.L.P.K.) and were still detained by the authorities at the time of trial.

Other witnesses who testified at the trial were: Puan Rosni bt Hamid (PW2 - the Government Chemist); D/Kpl Syaid Mohd bin Syaid Yahya (PW1 – the Police Photographer); L/Kpl Tamichelvan a/l Perumah (PW4); ASP Mohd Zuhairi bin Hamzah (PW5 – the Investigating Officer); En. Abu Kasim bin Mohd (PW6 – an officer from the Road Transport Department) and D/S/M Hamzah bin Ayob (PW7), who supported in material particulars the story of PW3. To avoid repetition, I would propose to confine narration later of the Government Chemist's (PW2) evidence to the extent only of portions of her evidence and while discussing the points raised by the defence.

After seven witnesses had testified in support of the prosecution case, the learned deputy offered twenty witnesses to the defence including the said two nephews Yusuf and Wahid who, according to the learned deputy, were still detained in P.P.A. Muar, Johore, and closed his case. At the end of the case for the prosecution the defence made no submission of no-case-to-answer. After having evaluated all the evidence adduced by the prosecution, and being keenly aware of the prosecution case that the accused was virtually caught red handed, according to PW3 and PW7, the court held that a *prima facie* case had been made out against the accused.

In his evidence the accused testified that in January 1999 and until the date he was arrested on 30 January 1999 he lived at No. 24 Taman Nuri, Alor Setar. He lived there together with his wife and his three children. On 29 January 1999 his nephew Wahid bin Mat, who lived in Sadao, together with one Chinese man came to his house, asking him to lend them his Ford TX3 car (P20), as his own car had broken down. Wahid borrowed P20 for one day from 29 January 1999 to 30 January 1999. However, as Wahid could not return the car to the home address of the accused he called the latter on the phone to collect the car at the Duty Free Complex in Bukit Kayu Hitam. At about 8am on 30 January 1999 the accused took a taxi and went to Duty Free Complex in Bukit Kayu Hitam. While waiting for Wahid, he bought a shirt at the Duty Free Complex. Later Wahid came and handed over the car to him. Wahid also told him that he wanted to come to his house after Maghrib prayers (evening prayer) to meet Yusuf bin Mat who is the accused's other nephew. At about 9am the accused left Bukit Kayu Hitam. On the way to Alor Setar he dropped by at M/S Marvel Garage to have his car tuned. Thereafter, he went home. At 4.15pm, while he was at home, Yusuf and his wife came to his house. Yusuf drove a Proton Putra (P19) and his wife Noor Faridah drove a pick-up vehicle

bearing a Thai registration number VJ 361. At 5.00 p.m. he drove the Proton Putra to his brother's house at Sungai Baru, Gunung Keriang together with his wife and his children. He was at his brother's house for about an hour before proceeding home. At 7.50pm he came out from his house to move the Proton Putra as it was obstructing the way. While he was opening the car door, he was ambushed by a police party. The police did not carry out any search at the scene but instead immediately took him to the Narcotics Department in IPK.

At the IPK, the police carried out a search on both cars. From the rear partition of both cars they found plastic packets of compressed substance. He was shocked upon being informed by the police of the discovery. Thereupon he informed PW3 (C/Insp.Mohd Fadzil) that he had previously lent the Proton Putra to Wahid bin Mat. He also informed the police that both Wahid and Yusuf were coming back to his house on the same night to take back the car. At 9.30pm the same night, he was taken by the police to his house. All his family members were at home that night. After about an hour while the police were still in his house, he received a phone call from Yusuf saying that he was unable to call at his house that night. Thereafter he was taken back to the IPK.

On 30 January 1999, the next day he came to know that Yusuf and Wahid were arrested by the police in connection with this case. At this juncture, it may be noted that his story that the two nephews had access to the two vehicles P19 and P20 was consistent with the evidence of the Investigating Officer (PW5) that the said nephews were also arrested and detained in connection with the police report (P21). He adamantly denied that he was arrested by the police while he was in midst of inserting some packages into the Proton Putra. He insisted that he knew nothing of any of the offending plastic packets. The first time he saw the impugned plastic packets, was at the Narcotics Department at the IPK. After Yusuf and Wahid were arrested on 31 January 1999, and after he informed the police that Wahid had borrowed his Ford TX3 car previously, the police did not at any time after that interrogate him (the accused).

Under cross-examination, (DW1) denied that he was making up a story that shortly before he was ambushed he received a phone call from Yusuf, and that he came out from his house to move his car as it was obstructing the way. He also denied that he was arrested at his house on the night in question because he was involved in the drugs discovered by the police in both the cars.

Accused's wife (DW2), testified that on 29 January 1999 her husband's nephew, one Wahid bin Mat together with a Chinese man came to their house requesting to borrow her husband's Ford TX3 car as his car had broken down. Wahid took the car on 29 January 1999 and promised to return it the next day. On the next day (30 January 1999) before she left for work at 7.30am, Wahid called her husband on the phone to go and collect back the car at Bukit Kayu Hitam. When she came from work, at 4.45pm on the same day, she saw a Proton Putra in front of her house. According to her husband, the car belongs to Yusuf. Not long after that, she and her husband went to Sungai Baru to visit her husband's brother. They came back at about 7.30pm. Between 7.30 to 7.45pm she heard someone call her husband to move his car. She added further that at between 8 to 8.15pm some plain clothes policemen entered their house and carried out a search. They, however, did not discover any incriminating item in the house.

The Law

After an accused is called to enter on his defence, as the general burden of proof rests on the prosecution throughout the trial to prove its case, the court is not restricted to merely evaluating the evidence adduced by the defence. It is nevertheless the bounden duty of the court as enjoined in s. 182A of CPC and *Kumaraguru & Ors v. PP* ([1994] 2 CLJ 53) and *Pavone v. PP* ([1984] 1 MLJ 77) to also carefully re-evaluate the whole of the evidence of the prosecution in conjunction with the defence evidence, to determine upon a higher standard of proof whether a reasonable doubt has been raised as to the guilt of the accused. Indeed, on the question whether a reasonable doubt has arisen, I would subscribe to the brilliant and lucid views expressed by Mohamad Azmi (SCJ) – as he then was, in *Mohd Radhi bin Yaakob v. PP* ([1991] 3 CLJ 2073), who had this to say: "In appropriate cases it is also not wrong for the court to conclude that the defence story is false or not convincing, but in that instance, the court must not convict until it asks a further question, that even if the court does not accept or believe the defence explanation, does it nevertheless raise a reasonable doubt as to his guilt?".

Notably, the crucial *ratio decidendi* in *Pavone* and *Kumaraguru* has not been specifically discussed and debunked even in *Khoo Hi Cheang* or *Arulpragasan (supra)* which two authorities, while advocating the 'maximum evaluation beyond reasonable test', also infact endorsed the need for there to be a re-evaluation of all the evidence adduced at the trial, at the end of the defence case. Thus, where the prosecution has made out a *prima facie* case and the accused, in his defence, offers an explanation the

burden to establish proof of the offence beyond reasonable doubt is still on the prosecution, and if, upon a review of the evidence on both sides, there is a reasonable doubt, the accused must be acquitted.

The burden of proof on the prosecution is governed by s. 182A of the Criminal Procedure Code which reads as follows:

(1) At the conclusion of the trial, the court **shall consider all the evidence adduced before it** and shall decide whether the prosecution has proved its case beyond reasonable doubt.

(2) If the court find that the prosecution has proved its case beyond reasonable doubt, the court shall first find the accused guilty and he may be convicted on it.

(3) If the court finds that the prosecution has not proved its case beyond reasonable doubt, the court shall record an order of acquittal.

There is an obligation on the prosecution to call as witnesses, persons whose evidence is essential to unfold the narrative upon which its case is based. (See *Seneviratne v. R.* [1936] 3 All ER 36; *Teoh Hoe Chye v. PP* [1987] 1 MLJ 220 at p. 229). It is at the conclusion of the trial that the court will consider all the evidence adduced before it and decide whether the prosecution has proved its case beyond reasonable doubt. (See *Teoh Tian Lai v. PP* [2001] 1 MLJ 257). This exercise will necessarily entail a consideration of whether the defences advanced, where plausible, have been negated by the prosecution. This can only be done by an evaluation of the evidence of witnesses who have been called by the prosecution and evidence which could have been adduced but was not. The exercise may reveal that the evidence of a witness not called, though not material at the close of the case for the prosecution, has turned out to be crucial in the light of the defence presented. Thus, the question to be asked in each case is whether the prosecution has proved its case even without calling some other witnesses who are available. An adverse inference cannot be drawn for failure to call a witness when the prosecution has discharged its burden. (See *Namasiyiam & Ors v. PP* [1987] 1 CLJ 540; *Kadir Awang v. PP* [1989] 2 MLJ 33; *Jazuli Mohsin v. PP* [1990] 1 CLJ 915; *Lim Young Sien v. PP* [1994] 2 SLR 257; *Chua Keem Long v. PP* [1996] 1 SLR 510 at p. 523-524). In such circumstances it is also not necessary for the prosecution to offer or make available the remaining witnesses to the defence. As Yong Pung How CJ said in *Satli Masot v. PP* ([1999] 2 SLR 637 at p. 649), that no adverse inference may be drawn (under the Singapore s. 116g) if the witnesses 'were not material or indispensable witnesses' to establish the prosecution case – as that provision did not impose upon the court a

mandatory presumption. 'Whether or not such an inference (under s. 114(g)) should be drawn is not a matter of an inflexible rule but depends upon the circumstances of each case' per Chong Siew Fai in *PP v. Mansor Abd Rashid* ([1997] 1 CLJ 233).

The Instant Case

Though, in the light of the above adumbrated guidelines, the evidence adduced by the prosecution on the three features of their case pertaining to the impugned drug exhibits – namely (i) their identity; (ii) the nature of recovery; and, (iii) the exclusivity of possession – may have withstood the *prima facie* test at the end of the prosecution case (as per s. 180(i) of the CPC) yet, since all the three features of the evidence have now been challenged by the accused, this court must now embark upon a re-evaluation of all the evidence before the court, as mandated by s. 182A(i) of the CPC, to determine whether these three evidential features have been proved beyond reasonable doubt.

Exclusivity Of Possession

On the question of exclusivity of possession, I am reminded of the *dicta* in *Abdullah Zawawi v. PP* ([1985] 2 MLJ 16) where Salleh Abas LP said at pp. 18-19: "If the doubt consists of the gap arising out of the matters adumbrated earlier, the prosecution must close this gap. It is not for the defence to call the offered witness/witnesses to supplement the prosecution case." Since the prosecution is required, as in *Ti Chuee Hiang v. PP* ([1995] 2 MJL 433) 'to call all witnesses necessary to unfold the narrative of their case' the legal requirement of the narrative of the prosecution in the case at hand would necessarily have been to establish exclusivity of possession on the part of the accused. The gap in the current case is to rule out exclusive possession of the drug exhibits by either one or both of the accused's two nephews to the exclusion of the accused.

Now, let us consider whether in the circumstances of this case, it is essential for the prosecution to call the two nephews as witnesses. Section 114g was designed and intended to be the prosecution's shield – against the invocation of the adverse inference – but not as a prosecution's sword with which to thrust on to a conviction. Thus, in respect of the essential ingredients of their case, the prosecution is in law, required throughout the whole trial, to wield and thrust the sword into the very corpus of the defence, by establishing and fastening onto the accused the essential ingredients of the offence. It is untenable in law for the prosecution to offer witnesses so as to enable the defence to fill up any material gaps in the prosecution case. It is trite that possession is an essential ingredient of the

charge. And, it is also trite, logical and incontrovertible that in any possessory offence, possession bereft of exclusivity bears no significance and attracts no consequence in criminal jurisprudence. See *PP v. Ong Cheng Heong* ([1998] 4 CLJ 209) and *PP v. Noordin bin Awang* ([2001] 1 AMR 855). It follows, that exclusivity – or more aptly – exclusive possession, is an essential element of the charge in the current case. My view is fortified by the following *dicta* of Abdul Hamid Omar LP in *Pang Chee Meng v. PP* ([1999] 1 MLJ 137 (Supreme Court) at p. 142):

> The learned judicial commissioner was manifestly wrong to find as a fact that the accused had **exclusive possession** when all the while his stand, when he made the cautioned statement, had been that there were three others sharing the accommodation. ... In the light of the material contradictions and the circumstances surrounding, we are not satisfied that the prosecution had proved **exclusive custody and control of the drugs found in the room**. We accordingly decided at the conclusion of hearing to allow the appeal and quash the conviction. Accordingly, the accused was discharged and acquitted.

It is imperative for the prosecution to establish that the accused in this case had exclusive possession of both vehicles in which the impugned drugs were recovered. And, it is material to note that the prosecution did not seriously challenge the essential tenor of the accused's story which points to the said nephews having respectively, had access to both the said vehicles during the material period prior to his arrest. In this regard, the notable unchallenged features of the evidence are that: (i) the Proton Putra was in fact owned by the wife of the nephew of the accused, Yusuf bin Mat, and was in fact used by the said Yusuf bin Mat prior to the accused being arrested; (ii) the Ford Laser had in fact been used by another nephew of the accused, Wahid bin Mat, the day before and only returned to the accused on the day he was arrested (see DW1's evidence, as corroborated by DW2's evidence, to which there was no challenge, implying concession on the part of the prosecution); and most importantly, (iii) both the nephews of the accused were **in fact arrested in relation to this case**!

Thus, by putting the nephews on the witness stand the prosecution would at the very least have thrown vital light on the issue of 'exclusivity of possession' and they would also have conducted the case with strict adherence to the best evidence rule enjoined in criminal cases. They ought to have called the accused's said nephews to eliminate the possibility of access by them to the impugned drugs which would have enabled the prosecution to establish the essential ingredient in this charge, of exclusivity of possession on the part of the accused.

By their failure to call Wahid and Yusuf (the two nephews), the prosecution has unwittingly projected an equivocation in terms of at least three probable factual permutations, namely: the accused was in exclusive possession of the offending drugs to the exclusion of all persons including the two nephews; both or either one of the two nephews was in exclusive possession of same to the exclusion of the accused and all persons; and, the accused together with his two nephews were in exclusive possession to the exclusion of the rest of the world, in which event all three of them should have been jointly charged – on a charge framed in conjunction with s. 34 of the Penal Code.

If in fact it had occurred as in the first permutation, the two nephews would not have been detained by the authorities as the direct result of the same recovery of drugs from P19 and P20 and/or their activities on the same day in question. If the third permutation holds true, it remains an unfortunate fact that the three of them were not jointly charged. Consequently, the situation as per the second permutation could possibly have occurred on that fateful day. Such considerations would of course be irrelevant if the onus in law lies squarely on the shoulders of the accused to prove that he did not have exclusive possession of the impugned items. In the instant case, it is obviously not irrelevant, as it is incumbent on the prosecution to prove exclusivity of possession. It is thus incontrovertible that both the nephews are very material witnesses to complete the prosecution's narrative to establish the gravamen of their case. Indeed, by not calling any of the nephews the prosecution may have prejudiced the defence case considering that there is a high probability that the evidence of both or either one of the nephews, if called, may be favourable to the defence. Hence upon particular facts of this case, I am also perforce driven to invoke – which I now do – s. 114(g) of the Evidence Act against the prosecution, even though the two nephews were offered to the defence, as, due to the crucial materiality of the gap in the evidence, the failure to call them would constitute withholding or suppression of evidence. See also *PR v. A Rashid b. Ismail* ([2001] 1 AMR 1149). And, since they have not discharged their bounden duty, the accused is entitled to have the benefit of the more favourable second factual permutation. To conclude, in not calling the two nephews or charging them jointly with the accused the prosecution had inflicted upon itself a gamut of multi-faceted problems which, unfortunately, were insurmountable.

Nature Of Recovery Of Drugs (From P19 By PW3 And PW7)

The prosecution has sought to inculpate the accused by attempting to establish a factual finding of possession as understood in criminal law, by giving a version that the accused was caught inserting the packages containing the impugned drugs into the side compartment of the Proton Putra (P19). I have thus to carefully examine this aspect of their case.

PW7 categorically states that the accused was 'in the midst' (and therefore had not completed) of inserting the 25 packages into the right side speaker hole/compartment of P19 (the Proton Putra). If in fact, the accused was **in the midst** of putting the packages into the right hand speaker hole of the said Proton Putra (P19) all of the said 25 packages would not have been put into the said right hand speaker hole of the said car, bearing in mind that the accused was arrested immediately thereafter. The natural inference would be that the accused would have immediately ceased what he was 'in the midst' of doing. This would necessarily mean that not all of the said 25 packages would have been recovered from **inside** the right hand speaker hole of the said Proton Putra as the accused, who was 'in the midst' of the alleged said activity, would not have completed inserting all of the said 25 packages into the said right hand speaker hole of the said Proton Putra (P19) (as confirmed by PW3 in cross-examination). And, the said speaker hole/compartment would not have contained **all** of the said 25 packages from the striped bag the accused was alleged to have carried. This 'in the midst of inserting' story is also in conflict with the undisputed evidence of recovery of **all** 25 packages from the right hand speaker hole/compartment of P19 as stated in the police report of PW3 (exh. P21). Consequently, due to this material inconsistency, and bearing in mind that PW3 is the prosecution's star witness, the question of corroboration cannot arise (See the Indian Supreme Court case of *Mohd Iqbal M. Shaikh & Ors v. State of Maharashtra* [1998] SCC (Cri) 1064). PW7's evidence in the circumstances, suffers similar infirmities as PW3's, which surely cannot be the foundation upon which a conviction on a capital charge such as this can stand. PW7 states that his group did not directly go towards P19. 'Kumpulan saya juga tidak terus pergi ke kereta ADP 9630.' (Trans: My team also did not go straight to car ADP 9630). However, this conflicts with P21, (PW3's police report). When confronted, PW7 says as follows: Katakan: 'SP3 kata 'saya bersama pasukan terus menghampiri kereta Putra No. ADP 9360.' (Trans: Put: PW3 said, 'my team and I went straight to the Proton Putra No. ADP 9360') Jawapan: 'Saya setuju dalam P21 ada berbeza dengan apa yang saya katakan, tapi saya cakap benar.' (Trans: Answer: I agree that P21 differed from what I stated, but I'm telling the truth).

Finally, by sieving through the evidence, it is to be observed that PW3 had attempted to convince this court that what he had seen was clear, as the light in the car (P19) was switched on as he sprang upon it ('Ketika itu lampu di dalam Proton Putra menyala sebab pintunya tak tutup rapat'). (Trans: At that time the interior of Proton Putra was lit because its door was not tightly closed). However, putting his (PW3's) credibility (and consequently the prosecution's version) on the line, PW7 in cross-examination, had stated that PW3, had opened the door of P19 ('Saya pasti SP3 membuka pintu kereta ADP 9630') (Trans: I'm sure PW3 opened the door of car ADP 9630). If according to PW3 the lights in the said car were on, this would probably have been because the door was not closed rather than not tightly closed, bearing in mind that he couldn't at that point in time have had the opportunity of inspecting how well the door was closed. If the door was not closed, why did PW7 testify that PW3 had to open the door of the said car? (which would have implied the lights were not on). Consequently, there is an acute conflict of evidence between the two on this score *vis-a-vis* P21.

The end result is that the evidence of both PW3 and PW7 as regards the recovery of the drugs from P19, is fraught with material discrepancies and inconsistencies. The prosecution's version on this particular aspect of their evidence cannot be believed, though it would have helped their cause had they dusted for and succeeded in lifting the accused's finger prints from any one of the 50 plastic bags (exh. P12A-Y and exh. P17A-Y) which according to PW2, had smooth surfaces. And, the accused's assertion that he had not entered the said car when he was arrested could probably be true. As such, at least in so far as the manner of recovery of the drugs from P19 is concerned, the accused in a capital case like this, certainly ought to be given the benefit of the doubt and it is his version that ought to be accepted.

Thus, I would hold that the prosecution has failed to prove that the accused was in exclusive custody and control of the offending items, and that the presumption under s. 37(d) of the DDA 1952 should not be invoked. We have here to be mindful of the trite law that a car – such as the Proton Putra (P19) and Ford Laser (P20) here – does not fall within the words 'anything whatsoever containing any dangerous drugs' in s. 37(d) of the Act. (See *PP v. Lim Lian Chen* [1992] 2 CLJ 2086; *Tong Peng Hong v. PP* [1995] MLJ 232). And further, the compartments in which the aggregate 50 packets were recovered from P19 and P20 were not 'specially constructed compartments' as conceded by PW3 in cross-examination. Hence, s. 37(h) of the Act is also inapplicable.

I shall now deal with counsel's submission on the extent of probity of the evidence adduced by the prosecution as regards the identity of the drug exhibits, which, for convenience I shall divide into four headings namely on: (i) discrepancies as regards physical appearance; (ii) tests not conclusive; (iii) any doubt as to homogeneity of substance; and, (iv) non-compliance with s. 37(j) DDA 1952.

(i) Discrepancies As Regards Physical Appearance ('Ketulan' vs 'Bahan Mampat')

In this regard, the prosecution's star witness Chief Inspector Mohd Fadzil bin Saad (PW3) stated repeatedly in examination-in-chief on 30 July 2000 that the items seized were 'ketulan'. However, on 31 July 2000, PW3 suddenly changed his version as to the appearance of what was recovered: 'Sebenarnya bukan ketulan-ketulan tetapi bungkusan plastik yang di dalamnya, mengandungi bahan mampat yang disyaki …' (Trans: Really, they were not in lumpy or granular but in compressed form, suspected …). I have to cautiously consider PW3's evidence in this regard as there is a marked difference between the words 'ketulan' and 'bahan mampat'. Accordingly to the Kamus Lengkap 'ketul' means 'granular, or in lumps or pieces,' whilst 'mampat' means 'compact, closely or densely packed.' That in fact they differed, was readily conceded by PW3: 'Saya setuju pada awal keterangan saya, saya sering menggunakan perkataan 'ketulan' tapi kemudiannya saya mengguna perkataan 'blok mampat'. Saya setuju dalam Bahasa Malaysia bahawa saya dikatakan ketulan dan dikatakan blok mampat ada perbezaan.' (Trans: I agree that during the early part of my evidence, I had always used the word lumpy/pieces/granular but I later used the word compressed block. I agree that in Bahasa Malaysia there is a distinction between the words lumpy/granular and compressed block).

If in fact the items seized were 'mampat' then why repeatedly describe them as 'ketulan' which is a markedly different description of form of the drug-mass. PW3 himself had, in cross-examination, agreed that if in fact a substance was 'mampat', one would not describe it as 'ketulan': 'Saya setuju jika bahan itu bahan mampat saya tidak akan panggilnya bahan ketulan atau ketul.' (Trans: I agree that if the material is compressed, I would not call it lumpy material or granular). Further, although PW3 would appear to have altered his evidence from 'ketulan' to 'bahan mampat', his police report (P21) bears unalterable written contemporaneous testimony that the items seized were 'ketul', wherein he had stated: 'Saya terus membuat pemeriksaan dalam kereta No. ADP 9630, (Proton Putra) dan menemui sebanyak (25) ketul disyaki …' (Trans: I went directly to inspect the interior of car No.ADP 9630, (Proton Putra) and found a total of 25

lumps or pieces suspected to …). It is trite that in a criminal case, especially when it concerns a matter of life and death the accused is entitled to take every opportunity to show the defects in the prosecution case however technical it may appear to be – a *fortiori*, in cases involving heroin, which attracts the normal scientific phenomenon that its original white colour sustains significant change (as indeed confirmed by PW2) due to oxidation occurring during the passage of time from seizure to trial. Similarly, the differing description of the impugned drugs as 'ketulan-ketulan berwarna merah jambu' by the raiding constable (PW3) and 'bahan serbuk berwarna merah' by the Government Chemist (PW2) was marked as a material discrepancy and held to be fatal on the question of identity, by the Supreme Court in *Yeong Kia Heng v. PP* ([1992] 1 CLJ 364). The principle in *Yeong Kia Heng* has in fact been applied by me in *PP v. Peter Yeoh & Anor* [1993] 1 CLJ 78). In the circumstances, by this doubtful evidence, which is far from satisfactory, the prosecution has failed to discharge its burden as required by law on the identity of the alleged drug contents in P12A-Y and P17A-Y.

(ii) Tests Not Conclusive

The prosecution is duty bound to adduce beyond reasonable doubt conclusive evidence that: (i) the impugned substance is in fact heroin; and, (ii) the amount is at least 15 grams, the statutory minimum prescribed under s. 37(da)(i) of the Dangerous Drugs Act 1952, so as to sustain a charge of trafficking.

In this case, PW2, Puan Rosni bt Hamid, the government chemist testified in examination-in-chief as follows in relation to the tests she conducted: 'Dua ujian warna saya jalankan iaitu ujian Frohde's dan ujian Marquis. Hasil daripada keputusan kedua-dua ujian warna tersebut ialah positif dan menunjukkan kemungkinan adanya heroin seperti yang disenaraikan dalam Akta Dadah Berbahaya 1952. Seterusnya, saya ambil sedikit lagi daripada serbuk putih untuk ujian T.L.C. iaitu Thin Layer Chromatography. Ujian ini juga memberi ujian keputusan positif iaitu mengesahkan heroin ada di dalam serbuk bahan. Seterusnya saya jalankan ujian gas chromatography untuk memastikan berat heroin di dalam serbuk tersebut.' (Trans: I conducted two colour tests ie, Frohde's and Marquis tests. The two tests gave positive results and showed the possible presence of heroin as listed in Dangerous Drugs Act 1952. I further took a little bit more of the white powder for the Thin Layer Chromatography test (TLC test). This test showed a positive result which confirms the presence of heroin in the substance. I further conducted gas chromatography test to determine the weight of the said powder). Notably, the same procedure was carried out in relation to the contents in Block 'E' and similarly in relation to the contents in block 'E1'.

Clearly, the Frohde and Marquis tests are not conclusive. The TLC (Thin Layer Chromatography) test is the conclusive test, as readily admitted by PW2 under cross-examination: 'Saya setuju bahawa ujian Frohde's dan Marquis bukanlah conclusive. Untuk mengesahkan keputusan, ujian TLC perlu dijalankan.' (Trans: I agree that Frohde's and Marquis test is not conclusive. To confirm the result, the TLC test had to be carried out). Yet, despite admitting that only the TLC test would provide conclusive results, PW2 however testified she did not weigh the samples used for the said tests: 'Untuk ujian warna dan TLC saya tidak timbang berat sampel yang saya ambil dari blok No.1' (Trans: For the colour and TLC test I did not weigh the sample that I took from block No. 1). And, further in cross-examination, said: 'Saya setuju ujian warna ujian TLC adalah ujian qualitative. Saya tidak mengambil berat sampel untuk ujian qualitative untuk kesemua barang-barang kes, iaitu 50 bungkusan plastik iaitu exh. P12A hingga Y dan P17A hingga Y'. (Trans: I agree that the colour test (TLC test), is a qualitative test. I did not weigh the samples taken for the qualitative test in respect of all the listed exhibits ie, the 50 plastic packages namely exh. P12A – Y and P17A – Y).

Unlike the case of *PP v. Peter Yeoh* ([1993] 1 CLJ 78) where there was a defence concession as to the chemist's qualitative analysis, clearly in the present case, issue was taken in this regard. This can be seen from the manner in which PW2 was cross-examined, and where it was clearly suggested to PW2: 'Cadangkan: Cara penganalisa barang kes ini yang dipakai oleh kamu tidak memenuhi standard yang diperlukan untuk menunjukkan dengan conclusive bahawa bahan-bahan serbuk adalah heroin.' (Trans: Suggested: The mode of analyzing exhibits adopted by you did not meet the standard required to show conclusively that the powdered substance is heroin). In the circumstances, with this stark revelation by PW2, we are left in the dark as to whether an adequate quantity of the substance was used in the only analysis (TLC test) that could provide conclusive results. Thus, we would also not know conclusively whether at least 15 grams of the impugned drugs was heroin as defined under the Act. Bearing in mind that the two aforesaid colour tests could only yield a *prima facie* answer, the brutal nub of the question that the court has to ask itself – while eschewing bare statements from the witness – is: how on earth could it conclude that an 'adequate quantity' of the samples had been tested, without any clue as to weight of samples taken for the only conclusive (beyond reasonable doubt) test available in science?

In the case of *PP v. Saad bin Mat Takraw & Anor* ([1998] 3 CLJ 380), although a case concerning cannabis, in relation to the need for the court to determine whether the samples taken were of 'adequate quantity', I had

occasion to hold: 'In my judgment, since the government chemist had said that only the two qualitative chemical tests (DTL and TLC) were conclusive tests (the first two, namely the physical and the microscopic examination were inconclusive tests), it is the vital duty of this court to determine whether the samples taken by him are of 'adequate quantity' as defined in *Leong Bon Huat v. PP* ([1993] 3 CLJ 603). He has also to explain how the quantity or weight of samples taken from the bulk of 194 packets were representative of the whole. Thus, it stands to reason that bare assertions such as 'representative samples' would fall short of the 'adequate quantity' test laid down by the Supreme Court in *Leong Bon Huat*. Unless chemical tests have been conducted on 100% of the 194 packets (See *PP v. Chew Yoo Choi* [1990] 2 MLJ 444), reliance would have to be placed on the presumption provision in s. 37(j), which would require tests to be carried out on at least 10% of the 194 packets, ie, at least 19 packets. Compliance with this requirement is clearly mandatory in order to invoke s. 37(j). It follows that in the instant case any sample for chemical analysis taken from less that nineteen packets would be insufficient to satisfy the 'adequate quantity' (of samples) requirement. Most importantly, the third and fourth (qualitative) tests are severely wanting and certainly not conclusive for the purposes of the DDA 1952, given that it is common ground that the plant material was not tested in their totality but by sample, and therefore with the aid of the presumption under s. 37(j). Yet he had failed to adopt the mandatory procedures set out in s. 37(j), which by itself would be fatal to the prosecution case of trafficking.'

Similarly, although PW2 stated that the samples she took were 'sufficient' ('sample yang saya ambil adalah memadai untuk memutuskan kehadiran heroin ...') such a bare assertion would equally fall short of the 'adequate quantity' test laid down by the Supreme Court in *Leong Bon Huat v. PP* ([1993] 3 CLJ 603) and in *Saad Mat Takraw (supra).*

Apart from not being able to determine if the samples taken were of 'adequate quantity', the effect of the failure to weigh the said samples is further compounded by the fact that, as will be shown below, there is a doubt as to whether the samples (if at all sufficient in the first place) were truly representative of the whole bulk, namely, in this case – where the drug is alleged to be heroin – whether the substance tested was homogenous.

(iii) Doubt As To Homogeneity Of Substance Tested

The need for the substance tested to be homogenous is vital in cases where the drugs concerned is alleged to be heroin. In relation to the manner in which the grinding process took place, PW2 testified as follows under cross-examination: 'Untuk mengisar bahan mampat saya gunakan mesin

'ordinary kitchen blender' yang dibeli oleh Jabatan Kimia untuk menganalisa heroin. Jenama kitchen blender adalah Summit. Ada tiga kitchen blender di Jabatan Kimia Pulau Pinang yang digunakan untuk menghancurkan bahan mampat. Saya tidak tahu bila blender-blender itu dibeli. Saya tidak mempunyai apa mechanical knowledge mengenai blender. Saya bersetuju bahawa ahli kimia yang lain ada access dan gunakan mesin blender yang saya gunakan untuk analisa tersebut. Saya setuju pada masa saya analisa exhibit tersebut ada lapan ahli kimia yang lain di Jabatan Kimia, Pulau Pinang. Saya setuju bahawa blade blender kadang-kadang rosak. Saya gunakan tiga blender – dua Summit dan satu National blender. Sebelum mengisar bahan mampat saya tidak tukar rotating blade blender. Saya tidak tahu bila kali terakhir blade-blade di dalam blender-blender tersebut ditukar. Saya ada tukar blade sekali di Summit blender di dalam pertengahan analisa saya.' (Trans: To blend the compressed material, I used the 'ordinary kitchen blender' bought by the Chemistry Department to analyze heroin. The blender's trade brand is Summit. There are three kitchen blenders in Penang Chemistry Department that we use to disintegrate compressed material. I did not know when the blenders were bought. I don't have any mechanical knowledge about blenders. I agree that other chemists also have access and use of the blenders, which I employed to do my aforesaid analysis. I agree that at the time I analysed the said exhibits, there were eight other chemists at the Penang Chemistry Department. I agree that the blender blades sometimes sustain damage. I used three blenders – two Summit and one National blender. Before grinding the compressed material, I didn't change the blender's rotating blade. I do not know when was the last time the blades inside the blenders were changed. In the midst of my analysis I did change the rotating blade of the Summit blender on one occasion).

After careful study of her evidence, I find the following inherent shortcomings in relation to the blending process that she undertook:

(a) PW2 used only 'ordinary kitchen blenders', (though, in the Court's views, quite permissible), accessible and regularly used by eight other chemists at the Penang Chemistry Department, for the blending process. Surely, such ordinary blenders which are regularly used are susceptible to wear and tear. We need not go farther than our own kitchens to know that this is so and that substances blended by an ordinary kitchen blender can at times (especially if the blades are blunt due to over-use) not be uniformly blended, or in other words, homogenous (at times the result may be coarse or uneven). And, her bare assertion that 'the white material turned into powder' is insufficient – it is important here

to mark the vast difference between a bare statement and a concrete finding based on the physical methodology adopted by her in arriving at her statement. (See *PP v. Ang Soon Huat (infra)*).

(b) PW2, although an expert chemist, however readily conceded she had no mechanical knowledge whatsoever in relation to the said blenders (see above), and that the Summit blenders were different from the National blender – presumably in terms of efficiency.

(c) PW2 testified that the blender blades did in fact sustain damage occasionally ('saya setuju bahawa blade blender kadang-kadang rosak') (Trans: I agree that the blender blade are at times damaged). In fact, in the midst of her analysis in this case ('dalam pertengahan analisa saya') she had occasion to replace the blades in one of the Summit blenders. This is testimony to the fact that the blades did require replacement at times.

(d) Despite the above, PW2 however admitted that she did not know when the blenders were purchased, and did not replace the rotating blades in the blenders with new ones before she commenced the grinding process; nor was she aware when was the last time that the rotating blades of the said blenders were replaced.

In the circumstances, there certainly is a doubt as to the proper functionality of the said three blenders, which, as a consequence would give rise to a doubt as to the homogeneity of the substance analysed. The court must act on the evidence available and although PW2 testified that she was satisfied the said substance was homogenous her conclusion certainly cannot be supported by the methodology of blending adopted by her – and indeed flies in the face of her evidence.

In fact, with due respect to the learned DPP, the moment issue was taken as to the proper functionality or otherwise of the said blenders – an integral and essential part of the analytical process undertaken by PW2 – witnesses from the Chemist Department who were well-versed with the said blenders and who possessed some mechanical knowledge ought to have been called by the prosecution to fill in this material gap. In a criminal trial the best evidence rule applies and there has been an unexplained failure on the part of the prosecution in this regard.

By analogy, in *PP v. Chew Yew Choi* ([1990] 2 MLJ 444), on the issue of the functionality or otherwise of the gas chromatography machine used in that case, I have found the following helpful *dicta*: "Now PW1 testified that he came to the conclusion of 16.59g of heroin by using a calculating machine known as gas chromatography, but there was no evidence of the

samples taken from envelopes E, F, G and J being calibrated against a known standard of heroin. There was no evidence that the gas chromatography instruments were in good working order before the tests and analyses were carried out in accordance with reg. 27(1) Weights and Measures Act 1972, which states: It shall be the duty of the head of the department concerned to arrange for all weights, measures and instruments for weighing or measuring used by his department to be examined by the Inspector once in every year, and no such weight, measure or instrument for weighing or measuring shall be used unless it has been passed as fit for use and stamped during the current year."

As stated above, since there is a doubt as to whether or not the substance tested was sufficiently homogenous – which, by itself may or may not be fatal to the prosecution depending on the weight of samples tested – the failure of the chemist, PW2, to specify the actual weight of the samples tested aggravates the position. This is because it cannot conclusively be said beyond reasonable doubt that due to the homogeneity of the substance there was no necessity to specify the weight of the said samples or *vice versa*. Essentially, when a man's life is at stake, sufficiently rigorous standards of scientific analysis of drugs ought to be adopted.

The crucial need for there to be a truly representative sample of the substance, was again reiterated by me in *PP v. Peter Yeoh & Anor* ([1993] 1 CLJ 78) – a case concerning heroin – in the following language: "In regard to the first ground, (a) above, I agree with counsel that the quantitative testing of the drugs in the said 14 packets by PW1 is wholly unsatisfactory. Probably due to his inexperience – as he said that he had only six years working experience as a chemist when he tested the drugs in 1995 – he neither adopt the procedures set out in or relied on s. 37(j) of the Dangerous Drugs Act to arrive at his findings, nor did he ensure that truly representative samples were taken from the total mass of drugs in the said 14 packets seized, by mixing the total mass, reducing them into powder, coning and quartering for homogeneity before taking the samples. From the testimony of PW1 it is obvious that he left the said 14 packets continuously at all times, in the strongroom and took them out only to take out random representative samples but not for the purpose of making them homogenous for taking such samples. Significantly, he did not say whether the random representative samples were taken from one packet, or two packets or all the packets or from several locations in one packet. In short, he did not ensure that whatever samples he examined was representative of the gross contents of the said 14 packets submitted to him for analysis."

In fact quite apart from the grave uncertainty conveyed in the evidence to the court's mind as to the homogeneity of the substance, PW2 ought to have gone further than bare assertions, and give further details eg, whether in her analysis she found any consistency in the results of the analysis from one sample to another.

The Singaporean decision of *PP v. Ang Soon Huat* ([1991] 1 MLJ 1) is illustrative of the court, sanctioned requirements in relation to the manner of chemical analysis. The relevant parts of the judgment runs as follows: "Loh then started the blender and allowed it to operate for five minutes. He then repeated the process twice. He said that after the first operation, the substance was about 95% pulverized and that after the third operation, the substance was completely pulverized into a fine powder. Under cross-examination, Loh made the following statements in answer to questions put to him in that order: (5) there was no standard procedure to homogenize granular substances, but that the use of a blender 3 x 5 minutes was a most effective way of homogenization, and that he did not carry out any test to determine the homogeneity of the pulverized substance as there was no way to test it; (6) that he had no perception of the degree of homogenization achieved by the use of a blender nor of the actual degree of homogenization of the powder achieved by the blender used by him, but that he believed that a high degree of homogenization was achieved because the actual results of the HPLC tests showed that there was only a variation of heroin between the three samples of not more than 5%.

During cross-examination, Dr. Chow made the following statements: (13) that, from experience, the use of a kitchen blender (three runs of five minutes each) was sufficient to homogenize a granular substance (like the exhibit), that he could not tell the level of homogeneity (whether it was 80% or 90%), that he had looked at the powder and was satisfied with its homogeneity, but that he did not rely on visual inspection alone but also on the results of his final analysis, ie, where the final results of three randomly taken samples were consistent, the exhibit would be homogenous; (14) that he was not aware that there were other methods to determine whether a mixture of substances was satisfactorily homogenized; (20) that he did not agree that his 18 sets of data (6 from 2XHPLC, 2XGCMS, 2X369) X samples A, B and C were not capable of establishing the homogeneity of the exhibits where the samples were taken at random, and that the results of the tests proved the homogeneity of the exhibits. In re-examination Dr. Chow said that he was satisfied that 18 results from the three samples proved that sufficient homogeneity existed in the whole bulk."

In that case *(Ang Soon Huat)*, the defence was then called based on the standard of proof in *Haw Tua Tau*. However, at the end of the defence case, this is what the court had to say as regards whether or not the samples tested were in fact representative of the bulk: "Firstly, there is, in our view, insufficient evidence that the three samples were taken randomly. Secondly, given the possibility that the pulverized substance might not be homogenous in regard to the distribution of heroin therein, the prosecution has produced no experimentally verifiable and verified evidence *that the taking of three samples (assuming that they were taken at random) with a total weight of 0.4669g out of a weight of 110.45g, ie, less than 0.46%, from a granular substance which had been blended by an ordinary kitchen blender in the manner described, is a valid or sufficient procedure to obtain a representative sample of the bulk.* There is no evidence that Dr. Chow had done any testing to satisfy himself that this procedure was valid for this purpose. It would seem that Dr. Chow relied merely on the UN testing manual which referred to the methods of homogenizing granular substances in general terms. Also, the prosecution did not produce the actual blender used in this case, although both Loh and Dr. Chow were cross-examined on its suitability and efficacy in blending a granular substance containing many chemical compounds into a homogenous whole. We were asked to examine the condition of the actual pulverized substance, which we did, but that told us nothing about homogeneity of the contents or even the *uniformity of the colour since it is agreed that the exhibit had since undergone some chemical change.* It was assumed that blending the exhibit in that way made it sufficiently homogenous and that the *taking of three samples with a weight of about 0.46% of the whole* would give an acceptable degree of homogeneity for the purpose of calculating the amount of heroin in the exhibit. For the reasons given above, we find that the prosecution has not proved beyond reasonable doubt that the weight of the heroin as calculated from the analysis of the three samples was representative of the remaining 99.5% of the exhibits."

In that case, on the scientific analysis of drugs, I would wholly agree with the views of Chan Sek Keong J (as he then was) who had this to say: "For the above reasons, we accept the general criticism that the laboratory procedures prevailing at the time the tests were done on the exhibit were not sufficiently rigorous in terms of the standards required of scientific analysis of drugs. We are constrained to agree with this criticism not only because the highest standards of laboratory practice should be followed at all times in respect of any analysis, whatever its purpose may be, but particularly on an occasion when, the result of the analysis was literally a matter of life and death for the accused!" I am keenly aware of the fact

that the charge in *Ang Soon Huat (supra)* concerned only the amount 18.77 gm of diamorphine (not much above the critical 15 gm trafficking mark) out of a gross weight of 111.4 gm of pinkish granular substance seized from the accused by officers of C.N.B. (Singapore), whereas the current case involve a huge amount of heroin, yet nevertheless, it must not escape my notice that unlike the current case, therein the chemist: (i) disclosed the specific weight of each of the samples tested; (ii) revealed the actual results (variation of heroin of not more than 5%) of HPLC tests on the three samples; and, (iii) put the samples through three runs of five minutes each in a blender to homogenize the granular substance.

(iv) Non-compliance With Section 37(j) DDA 1952

Consequently, as a result of the uncertainty as to whether the said substance was in fact homogenous prior to the testing, compounded by the fact that PW2 failed to take down the weight of the samples tested, and the fact that tests were not conducted on 100% of the 50 packets, the mandatory procedure under s. 37(j) of the Dangerous Drugs Act 1952 ought to have been employed. This was unfortunately not done.

In *Saad Mat Takraw* referring to *Chew Yoo Choy* (*(supra)* – concerning heroin). I had held in similar vein, the following: "Unless chemical tests have been conducted on 100% of the 194 packets (see *PP v. Chew Yoo Choi* [1990] 2 MLJ 444), reliance would have to be placed on the presumption provision in s. 37(j), which would require tests to be carried out on at least 10% of the 194 packets, ie, at least 19 packets. Compliance with this requirement is clearly mandatory in order to invoke s. 37(j). It follows that in the instant case any sample for chemical analysis taken from less than nineteen packets would be insufficient to satisfy the 'adequate quantity' (of samples) requirement. Most importantly, the third and fourth (qualitative) tests are severely wanting and certainly not conclusive for the purposes of the DDA 1952, given that it is common ground that the plant material was not tested in their totality but by sample, and therefore with the aid of the presumption under s. 37(j). Yet he had failed to adopt the mandatory procedures set out in s. 37(j), which by itself would be fatal to the prosecution case of trafficking."

Despite the inadequacies in the chemists evidence as abovementioned and despite PW2 being aware of the requirement in s. 37(j) of the Dangerous Drugs Act 1952, this mandatory procedure was however not adopted by PW2, who testified: 'Saya tahu tentang Akta DDA 1952 dan sedar dengan s. 37(j). Saya setuju saya hanya ambil sampel dan tidak menganalisa semua serbuk barang-barang kes. Dan saya setuju saya tidak tahu berat sampel

yang saya ambil untuk ujian qualitative.' (Trans: I know about Dangerous Drugs Act 1952 and aware of s. 37(j). I agree I only took samples and did not analyze all the powdery drug case-exhibits. And I agree I do not know the weight of the sample which I took for the qualitative test.)

In all the circumstances, and with due respect to PW2, who had admitted this to be her first 39B case, I find the evidence on her method of analysis to be unsatisfactory and ambiguous at best and I hold that the prosecution has failed to prove conclusively and beyond reasonable doubt the chemical nature and identity of the drugs in this case.

In the event, based on the cumulative effect of all the above grounds, I find that the accused has succeeded in raising a reasonable doubt in his defence. Also, by their failure to call the two nephews and to prove the essential ingredient of exclusivity of possession of the impugned drugs, beyond reasonable doubt, the case against the accused falls to the ground.

I am duty bound to administer the law as an abiding servant of the law (needless to add, whether I had done so, the applicable test is objective). For the cogent reasons above adumbrated, and with much regret I am constrained to record an acquittal of the accused. I now pronounce the accused acquitted and discharged on both the charges.

In postlude, as this case concerns a huge amount of heroin in which the accused is gravely suspected to be intimately involved, I must say that I have taken great pains to lay bare and the anatomy of my decision making process, hopefully with the view to afford some guide to prosecutors and government chemists in future cases. As for the accused before me, I must warn him that it would indeed be foolhardy to dice with his life again in such nefarious activities; he must also be made keenly and acutely aware, mindful and conscious that he now stands acquitted not at all because I am persuaded as to his innocence but because the prosecution has failed to prove its case according to law. Lastly, this court would also wish to place on record its appreciation on the painstaking research and submission, rendered with about equal vigour, intensity and focus by both the learned deputy and counsel Jagdeep Singh Deo in this case.